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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. FELIZARDO VEGA et al., Defendants and Appellants.	B171051 (Los Angeles County Super. Ct. No. BA234222)

APPEAL from judgments of the Superior Court of Los Angeles County. Ronni B. Maclaren, Judge. Affirmed in part, reversed in part, modified in part.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant Felizardo Vega.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant Jose L. Vega.

Bill Lockyer, Attorney General, Robert R. Arnold, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jeffrey B. Kahan and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II, IV, V and VI.

Defendants Felizardo and Jose Vega[1] appeal their convictions and sentences for conspiracy to transport cocaine and conspiracy to possess cocaine for sale. We affirm the convictions but reverse and modify portions of the sentences. We reverse the sentence for conspiracy to possess cocaine because, as the People concede, the only punishable conspiracy was the conspiracy to transport cocaine. We reverse imposition of the "criminal laboratory analysis fee" because it does not apply to defendants convicted of conspiracy to transport cocaine.

FACTS AND PROCEEDINGS BELOW

Law enforcement officers obtained a warrant to wiretap a telephone belonging to defendant Felizardo whom they suspected of dealing cocaine. The court issuing the wiretap warrant sealed the portions of the affidavit referring to two confidential informants and an undercover agent.

The officers recorded over 260 hours of Felizardo's telephone calls including his conversations with co-defendant Jose and a third suspect Jaime Salazar. The officers used the records of these conversations along with the wiretap affidavit and other information to obtain search warrants for the homes and automobiles belonging to Felizardo, Jose and Salazar. The court sealed the entire affidavit for the search warrant, not just the portion referring to the confidential informants.

A search of Salazar's home resulted in the seizure of two tubs containing 42 "kilo-sized" bricks of cocaine; 20 bricks were in one tub and 22 in the other. At Felizardo's home officers seized a piece of green graph paper which may have contained records of drug transactions and approximately $9,000 in cash. At Jose's home officers found a bank deposit receipt in the amount of $10,000 and approximately $2000 in cash.

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[1] Because both defendants have the same last name we will refer to them in the future by their first names.

Felizardo and Jose were arrested and charged with conspiracy to transport cocaine and conspiracy to possess cocaine for the purpose of sale.

Defendants moved to suppress the evidence seized as a result of the wiretap and search warrants, to quash and traverse the warrants and to unseal the sealed portions of the affidavits referring to the confidential informants. Because defendants did not have access to the affidavits supporting the warrants at the time they made these motions the defendants asked the trial court to review the affidavits in camera pursuant to the procedures set out in *People v. Hobbs*[2] to determine whether all or some of the confidential informants' information should be unsealed and, if not, to determine whether the affidavits contain false statements or fail to establish probable cause for the searches.

The People filed responses to the defendants' motions and attached redacted copies of the affidavits deleting only the three paragraphs referring to two confidential sources and an undercover agent. This affidavit was originally prepared to obtain the wiretap and was incorporated into the second affidavit for the search warrant.

The trial court reviewed the unredacted affidavits in camera and conducted an in camera examination of the officer who prepared the warrant applications to determine whether the confidential informant information should remain sealed. Following this review the court made the following findings: (1) disclosure of the informants' identity or the contents of their information would not be of assistance to the defense on the issue of guilt; (2) there was insufficient evidence of false statements or deliberate omissions in the affidavits to require quashing the warrants; (3) there was no violation of the wiretap statute; (4) probable cause existed for the wiretap and search warrants; and (5) it was necessary the confidential informant information remain sealed. Accordingly the court denied the motions to reveal the identities of the confidential informants, to quash or traverse the warrants and to exclude the evidence seized under them.

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[2] *People v. Hobbs* (1994) 7 Cal.4th 948.

At trial a contract employee of the federal Drug Enforcement Administration (DEA) testified she monitored the calls from Felizardo's telephone and translated the calls from Spanish to English. From listening to approximately 240 hours of conversations she was able to identify the voices of the defendants as those of persons called "Nando" and "Luis" on the monitored conversations.

A jury convicted defendants of the crimes charged. As to the transportation charge the jury found the cocaine exceeded 20 kilograms and as to the possession for sale charge it found the cocaine exceeded 40 kilograms.

The trial court sentenced Felizardo to the middle term of three years on the possession for sale conviction plus a consecutive 20 years for the weight enhancement. On the transportation conviction the court imposed the middle term of four years plus a 15 year weight enhancement but ordered those terms stayed. The court also imposed the following fines and fees: a $9,200 restitution fine; a $9,200 parole revocation fine (stayed); a laboratory analysis fee in the amount of $50 plus penalty assessments; and a $20 court security fee.

The court sentenced Jose to the upper term of four years on the possession conviction and a consecutive 20 years for the weight enhancement. The court imposed and stayed a sentence for the transportation conviction consisting of the upper term of five years enhanced by 15 years for the weight of the cocaine. In addition the court ordered Jose to pay restitution in the amount of $9,600 and a parole revocation fine in the same amount. The revocation fine was stayed. Finally the court imposed a laboratory analysis fee of $50 plus penalty assessments; and a $20 court security fee.

Both defendants filed timely appeals.

DISCUSSION

I. THE TRIAL COURT PROPERLY DENIED THE MOTIONS TO SUPPRESS THE EVIDENCE SEIZED AS A RESULT OF THE WIRETAP AND SEARCH WARRANT, TO QUASH AND TRAVERSE THE WARRANTS AND TO UNSEAL THE PORTIONS OF THE WIRETAP AFFIDAVIT REFERRING TO CONFIDENTIAL SOURCES.

After the redacted affidavits were disclosed to defendants they did not supplement their motions to quash the warrants with any additional facts or arguments to show the affidavits failed to establish probable cause for the wiretap or the searches nor do they argue lack of probable cause on appeal. Consequently we deem defendants to have conceded the issue of probable cause unless there is something in the redacted paragraphs of the affidavits which would raise questions about the veracity of other allegations upon which the finding of probable cause rests.[3]

Therefore the questions before us are (1) whether the trial court correctly found the confidential informants' identities or the contents of their communications would not be helpful to the defense on the issue of guilt and (2) whether the trial court correctly found the defendants' general allegations of material misrepresentations or omissions in the affidavits to be unsupported by the public and sealed portions of the affidavits.

A. The Standard Of Review Is Whether The Trial Court Abused Its Discretion.

In reviewing a trial court's determination that it would not assist the defense on the issue of guilt to reveal the identity of a confidential informant or the nature of the informant's information we have applied the abuse of discretion standard.[4] This same

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[3] See *Franks v. Delaware* (1978) 438 U.S. 154.

[4] *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 31; *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1078, 1080; but see *People v. Otte* (1989) 214 Cal.App.3d 1522, 1535-

standard applies to the trial court's determination there were no material false statements or omissions in the informant's affidavit.[5]

Defendants argue, however, when these matters are determined by the trial court wholly on the basis of its in camera review of the affidavits and examination of witnesses—without any case-specific input from the defense in framing the issues to be determined or the questions to be asked—an appellate court should exercise its independent review of the evidence and make its own determination whether sufficient grounds exist to quash or traverse the warrant.

Our Supreme Court considered and rejected a similar argument in *Hobbs*.[6] The defendant in *Hobbs*, like the defendants in the present case, moved to unseal the search warrant affidavit, quash and traverse the warrant and discover the identity of the confidential informant. The trial court denied the motion in its entirety after a hearing, a portion of which was held in camera. The Court of Appeal reversed the subsequent judgment against the defendant on the ground the sealing of the affidavit and utilization of the in camera review and discovery procedure infringed on the defendant's right to due process. The Supreme Court granted review and reversed the decision of the Court of Appeal.[7]

The high court rejected the Court of Appeal's conclusion enforcement of a defendant's Fourth Amendment rights "cannot be entrusted to trial judges 'who may or may not have the legal sophistication to recognize the nuances of criminal procedure absent the assistance and vigorous advocacy of defendant and her attorney.'"[8]

1536 [suggesting review de novo]; and see *People v. Gordon* (1990) 50 Cal.3d 1223, 1245-1246 [noting the standard of review is not settled but not settling it].

[5] *People v. Duval* (1990) 221 Cal.App.3d 1105, 1113.

[6] *People v. Hobbs*, *supra*, 7 Cal.4th at page 970.

[7] *People v. Hobbs*, *supra*, 7 Cal.4th at page 955.

[8] *People v. Hobbs*, *supra*, 7 Cal.4th at page 970, quoting from the Court of Appeal's decision.

The court disagreed with the Court of Appeal for two reasons. "'Insofar as the use of sealed affidavits is unavoidable, it is not unusual or inappropriate for the 'burden' of protecting citizens' rights to fall upon our judiciary, and trial courts, as always, retain broad discretion in weighing the government's interests against defendants' rights.'"[9] Furthermore, "'[w]hile some defense critics have been distrustful of any unilateral determination of materiality reached without participation by defense counsel, and have been critical of placing an additional burden of judicial investigation upon the trial judge, the United States Supreme Court [has held] '[w]e cannot hold "that the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court."'"'"[10]

The court further observed, "It would be anomalous to conclude that a trial court, expressly deemed capable by our Legislature of making an in camera evaluation of a confidential informant's *materiality* as a witness to defendant's guilt or innocence on any claim of privilege under [Evidence Code section 1040 et seq.] could not likewise competently evaluate the necessity for sealing all or part of a search warrant on such a claim of privilege, take whatever further actions may be necessary to ensure full public disclosure of the remainder of the affidavit, and review all the relevant materials in camera to determine whether they will support defendant's challenges to the search warrant."[11]

Finally, the court held an in camera review of evidence on the issue of material misrepresentations or omissions in the warrant affidavit "'will assure the defendant of a judicial check on possible police misrepresentations . . . .'"[12]

Although the court in *Hobbs* was not addressing the issue of the standard of appellate review of the trial court's in camera determinations the court's powerful endorsement of the trial court's competency to determine the materiality of the

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[9] *People v. Hobbs*, *supra*, 7 Cal.4th at page 970, citation omitted.

[10] *People v. Hobbs*, *supra*, 7 Cal.4th at page 970, citations omitted.

[11] *People v. Hobbs*, *supra*, 7 Cal.4th at page 971, italics in original.

informant's information and to recognize misrepresentations and omissions in an affidavit without "the assistance and vigorous advocacy of defendant and her attorney" convinces us we should apply the usual abuse of discretion standard of review to the trial court's rulings.

In any event, having reviewed the redacted paragraphs of the wiretap affidavit we are convinced they contain no information useful to the defendants no matter what standard of review is applied. No information from the confidential sources was used to procure the wiretap or search warrant because, according to the affiant, *these sources had no such information*. The only reason the two confidential sources and one undercover agent were even mentioned in the affidavit was to show, in support of the wiretap application, that these individuals did not have information which would be of assistance in the current investigation.[13]

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE PERSON WHO MONITORED THE WIRETAPPED CONVERSATIONS TO TESTIFY AMONG THE VOICES SHE HEARD WERE THOSE OF DEFENDANTS.

Maria Mejia testified she was a contract employee of the DEA. Her job was to listen to telephone conversations intercepted by wiretaps and produce written translations of the conversations from Spanish to English. At the time of trial she had been doing this eight hours a day, five days a week, fifty weeks a year for five and a half years.

With respect to the telephone calls in the present case Mejia explained when a call occurred she listened to the live conversation and typed a brief summary of what the call was about at the same time the call was being digitally recorded. When the call concluded she would listen to the recording and proceed sentence by sentence to translate

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[12] *People v. Hobbs*, *supra*, 7 Cal.4th at page 974.

[13] One of the requirements for obtaining a wiretap is a showing "[n]ormal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous." (Pen. Code § 629.52, subd. (d).)

the conversation from Spanish to English. She listened to each call a number of times to make sure every word was translated correctly. Overall, Mejia testified, she listened to approximately 240 hours of conversations recorded under the Felizardo wiretap.

Following a hearing under Evidence Code section 402 the trial court ruled it would allow Mejia to testify two of the voices she heard on the wiretapped conversations belonged to defendants Felizardo and Jose.

At trial Mejia testified on the day defendants were arrested she spoke to each of them over the telephone. She identified Felizardo's voice as the voice of the person she referred to in the wiretap transcripts as "Fernando" and "Nando." She identified Jose as the person she referred to in the transcripts as "Luis" and "Jose Luis." Later the investigators gave Mejia tape recordings containing the voices of Felizardo and Jose. She listened to those recordings and compared the voices with the voices on the wiretap recordings. She confirmed the voices on the exemplars were the same as the voices of "Fernando" and "Luis" on the wiretaps.

On cross-examination Mejia admitted before she talked to the defendants on the telephone the police told her she would be speaking to two persons named Fernando Vega and Jose Luis Vega who were under arrest. She also admitted before she compared the voices on the defendants' recorded exemplars to the voices on the wiretap recordings the police told her the voices on the exemplars were those of the defendants. Mejia conceded she had no special training in voice identification and used no "scientific analysis" in identifying defendants' voices. Finally, she acknowledged the only voice exemplars she was given were the ones she was told came from defendants; she was not given several exemplars and asked if she could identify any of the speakers.

On re-direct Mejia testified she did not base her identification of defendants' voices on what the police told her but on her experience from working exclusively on the Felizardo wiretap for two months.

Defendants contend the trial court erred in allowing Mejia's voice identification testimony. They argue her testimony the voices on the wiretap recordings were those of

Felizardo and Jose was not admissible as expert or lay opinion. We disagree. The evidence was admissible as lay opinion.

Evidence Code section 800 states: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony." Admission of lay opinion is within the sound discretion of the trial court and will not be disturbed on appeal unless a clear abuse of discretion appears.[14]

Defendants maintain Mejia's identification of their voices failed to meet the criteria of Evidence Code section 800 because it was not "rationally based" on her own perceptions but was impermissibly colored by her foreknowledge the voices she would be hearing on the telephone and on the voice exemplars belonged to persons under arrest for the drug trafficking discussed in the wiretap whose names were Fernando and Jose Luis. Furthermore, even if her opinion was rationally based it was not "helpful to a clear understanding" of her testimony; identification of the defendants *was* her testimony. We find no merit in these arguments.

It was for the jury to determine whether Mejia's identification of defendants' voices was impermissibly biased by what she knew before she listened to them speak on the telephone and on the exemplar tapes. The trial court instructed the jury in determining the believability of a witness they could consider "the extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified" and "the existence or non-existence of a bias or other motive." The court further instructed the jury with respect to opinions by lay witnesses: "[Y]ou should consider his or her believability, the extent of his or her opportunity to perceive the matters upon which his or her opinion is based and the reasons, if any, given for it. You are not required to accept an opinion, but should give it the weight, if any, to which you find it entitled." These instructions allowed the jury, in

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[14] *People v. Mixon* (1982) 129 Cal.App.3d 118, 127.

considering Mejia's identification testimony, to factor in any undue influence on her identification of the defendants' voices.

Identification of persons through their voices is an area in which lay opinion has long been held necessary and acceptable.[15] Mejia's testimony she listened to approximately 240 hours of conversations involving "Fernando" and "Luis" surely established a sufficient foundation for her opinion those voices belonged to the defendants in this case.

III. SUFFICIENT EVIDENCE SUPPORTS THE WEIGHT ENHANCEMENTS.

Health and Safety Code section 11370.4, subdivision (a) imposes increasing levels of punishment for the transportation and possession of "a substance containing . . . cocaine" depending on the weight. If the weight is between 10 and 20 kilograms the punishment is an additional 10 years.[16] If the weight is between 20 and 40 kilograms the punishment is an additional 15 years.[17] And if the weight is between 40 and 80 kilograms the punishment is an additional 20 years.[18] Thus one additional milligram in one package containing cocaine can add five additional years to the defendant's sentence.

Here the jury found the weight of the cocaine transported was between 20 and 40 kilograms[19] and the total weight of the cocaine exceeded 40 kilograms. Defendants contend the evidence was insufficient to support these findings. We disagree.

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[15] See for example *People v. Lorraine* (1938) 28 Cal.App.2d 50, 53-54 and cases cited therein and see 1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence § 5, page 533.

[16] Health and Safety Code section 11370.4, subdivision (a)(3).

[17] Health and Safety Code section 11370.4, subdivision (a)(4).

[18] Health and Safety Code section 11370.4, subdivision (a)(5).

[19] The jury apparently accepted the evidence the 20 bricks in one of the tubs (the "transportation" tub) were the ones defendants conspired to transport and this tub originally contained 21 bricks but one brick went to a third party before the police executed the search warrant. Arnold estimated the average weight of the bricks in the

The only witness on the weight of the cocaine in this case was Tracy Arnold, a criminalist employed by the Los Angeles County Sheriff's Department. Arnold testified at the time she examined the cocaine seized in this case she had been testing drugs in 40 to 50 cases a week for more than two years.

Arnold received the cocaine still in the two tubs as seized by the police. One tub contained 22 bricks wrapped in black electrical tape. The other contained 20 bricks wrapped in clear plastic. The bricks were consistent with kilogram-sized packages. Arnold tested all the bricks and determined they each held a substance containing cocaine. The bricks of cocaine were not introduced into evidence so the jurors could examine them for themselves. The prosecution did, however, introduce photographs of all the bricks seized. Arnold testified the bricks in the photographs were similar to the ones she examined in this case but she could not say for sure they were the same ones.

To determine the weight of the cocaine Arnold first weighed each brick with its wrappings in place. She then selected eight bricks from the two tubs, removed their wrappings and weighed the powder alone to "get an approximation of the packages' weight of all the items." She did not state how many bricks she took from each tub. She did state, however, in selecting which bricks to weigh she took "ones that look[ed] smaller and bigger to try to get a representative number."

Arnold testified she computed the average net weight of the cocaine in the bricks by dividing the weight of the cocaine substance by the number of bricks tested.[20] On the basis of this sampling she formed the opinion the cocaine substance in the tub containing 20 packages had "an estimated total net weight of approximately 19,591 grams of powder containing cocaine." She also formed the opinion the cocaine substance in the tub containing 22 packages had "an estimated total net weight of approximately 21,896

"transportation" tub was 979.55 grams. She estimated the 20 bricks weighed 19,591 grams so if the missing brick weighed at least 410 grams the total estimated weight of the cocaine in the transportation tub would exceed 20 kilograms.

grams of powder containing cocaine." Thus, according to Arnold's calculations, the total weight of the substance containing cocaine was 41,487 grams or 41.487 kilograms.

Defendants produced no evidence contradicting Arnold's testimony or challenging her method of calculating the weight of the cocaine substance. They did ask Arnold why she did not weigh each of the 42 bricks without its wrapper. Arnold explained she would have done so if her estimate of their weight had been close to the margin of one of the enhancement weights but because her estimate "far exceeded" the 40 kilogram enhancement level she felt it was not necessary to determine the actual net weight of each individual brick. She conceded she did not know the exact weight of the substance containing cocaine and that "if I wanted the exact weight of each one I would have to take an exact net weight of each one."

On appeal defendants contend taking an exact net weight of each brick was exactly what Arnold should have done. Her failure to do so, they argue, requires the enhancements be reversed for insufficiency of the evidence. We disagree.

The test for sufficiency of the evidence is whether substantial evidence supports the jury's finding, not whether in our view the evidence proves the fact beyond a reasonable doubt.[21] Furthermore, the testimony of a single witness, including an expert witness, is sufficient to constitute substantial evidence to support a jury's finding.[22] Finally, in evaluating the sufficiency of the evidence we not only consider the evidence actually presented but also presume in support of the jury's finding the existence of every fact the jury could reasonably deduce from the evidence.[23]

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[20] Although it is not clear from her testimony Arnold apparently weighed the cocaine in the bricks from the tub containing 20 bricks separately from the cocaine in the bricks from the tub containing 22 bricks.

[21] *People v. Mincey* (1992) 2 Cal.4th 408, 432.

[22] Evidence Code section 411; *People v. Smith* (1995) 31 Cal.App.4th 1185, 1190.

[23] *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.

The evidence viewed in the light most favorable to the judgment[24] reasonably justifies the jury's findings as to the weight of the cocaine.

Arnold testified without objection the 42 bricks found at Salazar's home were consistent with one-kilogram size packages of cocaine. After obtaining the total gross weight of all 42 bricks Arnold calculated the total weight by unwrapping and weighing eight representative-sized bricks and multiplying the bricks' average weight by 42. Arnold stated without contradiction the method she used to arrive at the total weight of the bricks was "standard laboratory policy." Using this methodology Arnold testified (again without objection) the packages seized at Salazar's home had a total weight of 41.487 kilograms—21.896 kilos in one tub and 19.591 kilos in the "transportation" tub. Arnold's conclusions are consistent with the intercepted telephone conversations in which defendants discuss transporting "21 kilos."

Evidence of probability calculations was held sufficient circumstantial evidence to uphold a weight enhancement in *People v. Peneda*[25] There the defendant was convicted of possession and transportation of cocaine and the jury found the total amount of cocaine exceeded 100 pounds which resulted in a sentence enhancement of 15 years under former Health & Safety Code section 11370.4. The weight evidence consisted of the testimony of a criminologist who, like Arnold in the present case, weighed a representative sampling of the bricks seized and calculated the total weight of the seized cocaine exceeded 100 pounds.[26] On appeal the defendant argued the sampling evidence was insufficient to sustain a finding the cocaine exceeded 100 pounds. The Court of Appeal rejected this argument. It noted "there was *no* testimony to contradict [the criminalist's] assessment of the weight being in excess of 100 pounds" and this testimony "supported the ultimate conclusion: there was more than 100 pounds of cocaine [seized]."[27]

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[24] *People v. Ochoa*, *supra*, 6 Cal.4th at page 1206.

[25] *People v. Peneda* (1995) 32 Cal.App.4th 1022, 1031.

[26] *People v. Peneda*, *supra*, 32 Cal.App.4th at pages 1027-1028.

[27] *People v. Peneda*, *supra*, 32 Cal.App.4th at page 1031 [italics in original].

Defendants' true quarrel is not with the sufficiency of the evidence but with the foundation for Arnold's expert testimony as to the weight of the bricks. This would be a different case and the outcome might have been different had defendants objected to Arnold's testimony as lacking a sufficient scientific basis.[28]

In *People v. Peneda*, for example, the criminalist used a sampling technique developed by the DEA which indicated how many samples from a total number must be tested to arrive at a "'reliable'—i.e., within 99 percent accuracy—determination of cocaine weight and nature."[29] Using this formula the criminalist determined there was only 1 chance in 300 million the shipment at issue did *not* contain at least 100 pounds of cocaine.[30] Furthermore the court noted "[t]he jury was free to compare the selected bricks with the rest contained in each shipment [and] decide for itself whether the sampling was truly random."[31]

In the present case, by contrast, Arnold did not testify she used the DEA's 99 percent accurate statistical model or any other statistical model generally accepted in the scientific community. Nor did she explain why she sampled 8 of the 42 bricks rather than 15 or 5 or some other number. A sample which is 99 percent accurate is clearly more reliable and of more solid value than a sample which is "relatively accurate." Furthermore, defendants point out, Arnold did not represent she had any expertise in statistics. She testified the method she followed to determine the cocaine's total net weight was "standard laboratory policy" but the prosecution introduced no evidence as to what that policy was especially with respect to the percentage of bricks to be sampled and how the bricks should be selected. Finally, unlike the jury in *Peneda*, the jury in the present case was not "free to compare the selected bricks with the rest" and "decide for

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[28] Evidence Code section 801, subdivision (b) states an expert opinion must be based on matter "that is of a type that reasonably may be relied upon by an expert in formulating an opinion upon the subject to which his testimony relates[.]"

[29] *People v. Peneda*, *supra*, 32 Cal.App.4th at page 1029.

[30] *People v. Peneda*, *supra*, 32 Cal.App.4th at page 1029.

[31] *People v. Peneda*, *supra*, 32 Cal.App.4th at page 1031.

itself whether the sampling was truly random."[32] The jury was shown photographs of the bricks taken at the Salazar residence where they were seized. There was no evidence as to which bricks in the photographs Arnold selected for weight testing. The bricks appear to be approximately the same size but they are clearly not identical.

Arguably Arnold's sampling method does not support her opinion about the weight of the drugs in this case. Given her admission the bricks varied in weight there will almost invariably be a discrepancy between the average sample weight and the true weight. How big a discrepancy depends, among other things, on the number of bricks sampled and the weight of these bricks compared to those not sampled. But even if the discrepancy is small it may become very significant when multiplied by the aggregate of the drug in question.[33] Arnold's testimony provided no answers to the following questions: How many bricks out of 42 should be sampled to obtain a statistically reliable estimate of the total weight? Did the eight bricks Arnold weighed consist of four bricks from one tub and four from the other? If not, what was the ratio? How does that ratio effect the ultimate estimate of weight, if at all? What is the significance, if any, of the fact the average weight of the 20 bricks in the "transportation" tub appears to have been less than the average weight of the bricks in the other tub?

But even if Arnold's sampling technique was statistically valid it produced a result which by her own admission was insufficient to support the enhancements imposed in this case. Arnold admitted the weight she assigned to the cocaine was "approximate" and "relatively accurate" but to determine the exact weight each brick would have to be opened and its contents weighed.

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[32] *People v. Peneda*, *supra*, 32 Cal.App.4th at page 1031.

[33] Arnold calculated the bricks in the "transportation" tub weighed an average of 979.55 grams. (See footnote 19, *ante*.) On the basis of this calculation defendants received a 15 year enhancement on the transportation conviction. If Arnold's estimate was off by 28 grams (the equivalent of one ounce) the total weight of the bricks would have been 19.98 kilos, 3 grams short of the 20 kilogram weight necessary for the enhancement.

We find Arnold's admission troubling because the law does not authorize imposing a 20 year enhancement where the cocaine "exceeds *approximately* 40 kilograms." Furthermore, imposition of a weight enhancement requires proof beyond a reasonable doubt, not merely proof which is "approximate" or "relatively accurate." When a penalty as serious as 20 years' imprisonment may hinge on a single gram of cocaine it does not seem to be asking too much to require the prosecution to prove the weight of the drugs by the most scientifically accurate method available.[34]

Before leaving this topic it is appropriate to observe this whole issue could have been avoided if the sheriff's department had simply weighed the cocaine. If the drugs had been weighed on a properly calibrated scale defendants would have found it difficult if not impossible to dispute the result. In reality this case should not be about opinion at all. The drugs weigh what they weigh. Unless the defendants can prove the criminalist had her thumb on the scale the weight of the drugs would be virtually unassailable. Contrary to the suggestion in *Peneda* that actually weighing the drugs would be too burdensome on law enforcement agencies,[35] Arnold testified her agency does weigh every gram of the drug in question if the estimated weight is "close" to the margin for a higher enhancement penalty. We suggest this procedure be reversed and the weight of the drugs be determined by actual measurement except in cases where the estimated weight is so far above the minimum level required for the enhancement no rational person could dispute the requisite level exists.

Because defendants failed to move to exclude Arnold's testimony on the ground of lack of foundation they waived that argument on appeal. Evidence Code section 353 states in relevant part: "A verdict or finding shall not be set aside . . . by reason of the erroneous admission of evidence unless . . . [t]here appears of record an objection to or a

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[34] Indeed two state supreme courts have held as a matter of law to prove the weight of drugs the prosecution must either offer evidence of the drug's actual measured weight or demonstrate the quantity of the drugs is so large as to permit a reasonable inference the weight has been established. (*Halsema v. State* (Ind. 2005) 823 N.E.2d 668; *State v. Mitchell* (N.C. 1994) 442 S.E.2d 24.)

motion to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion[.]" As our Supreme Court has explained, "[t]he rationale for this rule is clear; a contrary rule would deprive the party offering the evidence of any opportunity to cure the defect at trial and would permit the nonobjecting party to gamble that the error will provide grounds for reversal of the matter."[36] Here the absence of an objection based on lack of foundation was prejudicial to the People because had such an objection been made and sustained the People could have gone back to the laboratory and weighed the bricks or applied a more statistically reliable method of estimating their weight.

IV. IMPOSITION OF THE UPPER TERM ON JOSE'S CONVICTIONS FOR CONSPIRACY TO TRANSPORT COCAINE AND POSSESS COCAINE FOR SALE DID NOT CONSTITUTE REVERSIBLE *BLAKELY* ERROR.

In sentencing Jose the trial court imposed the upper term on both counts because it found Jose induced others to participate in the crimes and the manner in which the crimes were carried out indicated planning, sophistication and professionalism.[37]

Jose contends imposition of the upper terms based on these factors violated his Sixth Amendment right to a jury trial under the holding in *Blakely v. Washington*.[38]

Even if we assume *Blakely* applies when imposing upper term sentences,[39] and even if we further assume the trial court's reliance on the factors of inducing others to commit crimes and sophistication in planning the crimes was erroneous under *Blakely*, in this case we conclude the error was harmless.

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[35] *People v. Peneda*, *supra*, 32 Cal.App.4th at page 1027, footnote 7.

[36] *People v. Coleman* (1988) 46 Cal.3d 749, 777.

[37] California Rules of Court, rule 4.421, subdivisions (a)(4), (a)(8).

[38] *Blakely v. Washington* (2004) 524 U.S. ____, 124 S.Ct. 2531.

[39] A question pending in our Supreme Court in a number of cases including *People v. Black* (S126182).

Blakely permits a trial court to impose an aggravated sentence based on "facts reflected in the jury verdict."[40] Here the jury expressly found the cocaine exceeded 40 kilograms. Even though we have concluded the evidence was insufficient to allow the jury to find the weight of the drugs *exceeded* 40 kilograms the facts reflected in the jury's verdict show the jury found beyond a reasonable doubt "[t]he crime involved a large quantity of contraband."[41] A single aggravating factor can justify imposing the upper term.[42]

For these reasons the *Blakely* error, if any, did not prejudice Jose.

V. THE TRIAL COURT ERRED IN IMPOSING SENTENCE ON BOTH CONSPIRACY CONVICTIONS.

At sentencing the trial court imposed sentence on both defendants for conspiracy to transport cocaine and conspiracy to possess cocaine for purpose of sale. It sentenced Jose to the upper term of five years for conspiracy to transport cocaine and the upper term of four years for conspiracy to possess cocaine for sale. The court sentenced Felizardo to the middle term on both convictions.[43] The court then found "the offense alleged in count 1 [conspiracy to transport cocaine] was necessarily incidental to the defendants' intent to commit the offense alleged in count 2 [conspiracy to possess cocaine for sale]; therefore, the sentence for [conspiracy to transport cocaine] is stayed pursuant to Penal Code section 654 as to each defendant."

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[40] *Blakely v Washington, supra,* 524 U.S. ___, 124 S.Ct. at page 2537.

[41] California Rules of Court, rule 4.421, subdivision (a)(10). See *People v. Maese* (1980) 105 Cal.App.3d 710, 725 [half ounce of heroin "large" for purposes of aggravated sentence].

[42] *People v. Osband* (1996) 13 Cal.4th 622, 728.

[43] The court's minute order and abstract of judgment incorrectly state the court imposed the upper term on these convictions and must be corrected. The People concur.

Defendants and the People agree if there was only one conspiracy, as the trial court found, then sentence should have been imposed only for the transportation offense because it carries "the greater maximum term."[44]

VI. IMPOSING THE COURT SECURITY FEE ON DEFENDANTS DID NOT VIOLATE THEIR RIGHTS UNDER THE EX POST FACTO CLAUSES OF THE CALIFORNIA AND FEDERAL CONSTITUTIONS.

Defendants contend the $20 court security fee imposed at sentencing must be stricken as an ex post facto penalty in violation of the state and federal constitutions because their offense was committed before August 17, 2003, the effective date of the authorizing statute, Penal Code section 1465.8.

In *People v. Wallace*[45] the court held the $20 court security fee could be imposed on defendants whose crimes were committed prior to its August 17, 2003 effective date. The court found the Legislature imposed the $20 fee for the nonpunitive purpose of ensuring and maintaining adequate funding for court security and designated it a "fee" as opposed to a "fine."[46] Furthermore, the court reasoned, there was not "'"the clearest proof"'" the fee was so punitive its purpose or effect was to override the Legislature's treatment of it as a nonpunitive measure.[47] The fee is assessed for the use of court facilities to make them safer; the same fee is imposed in civil, probate and traffic cases; and the enactment of the fee depended on the adoption of specified trial court funding levels.[48] Moreover, the fee is small; it does not promote the traditional aims of

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[44] Penal Code section 182, subdivision (a) states in relevant part: "If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of those felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term."

[45] *People v. Wallace* (2004) 120 Cal.App.4th 867, 870.

[46] *People v. Wallace, supra,* 120 Cal.App.4th at pages 875-876.

[47] *People v. Wallace, supra,* 120 Cal.App.4th at page 876.

[48] *People v. Wallace, supra,* 120 Cal.App.4th at page 877.

punishment; and it has a rational relationship to a nonpunitive purpose.[49] We agree with the holding in *Wallace* the $20 court security fee does not violate the ex post facto clauses of the state and federal constitutions.

VII. THE "CRIMINAL LABORATORY ANALYSIS FEE" (HEALTH AND SAFETY CODE SECTION 11372.5) DOES NOT APPLY TO PERSONS CONVICTED OF CONSPIRACY TO TRANSPORT OR POSSESS COCAINE.

The trial court imposed on each defendant a "criminal laboratory analysis fee" in the amount of $50 plus penalty assessments pursuant to Health and Safety Code section 11372.5, subdivision (a).

The laboratory fee applies to persons convicted of violating Health and Safety Code sections 11351 (possession of cocaine for sale) and 11352 (transportation of cocaine) but the statute makes no mention of persons convicted of *conspiracy* to commit those crimes. On the other hand there are numerous demonstrations the Legislature knows how to include conspiracy to commit an offense in a penalty statute when it wishes to do so. The weight enhancement statute discussed in Part III *ante* provides one such example. It states: "Any person convicted of a violation of, or of a conspiracy to violate section 11351 . . . or 11352 with respect to a substance containing . . . cocaine . . . shall receive an additional term as follows . . . ."[50] Therefore, defendants argue, the statute does not apply to them.

This argument, however, overlooks Penal Code section 182, subdivision (a) which provides (with some exceptions not relevant here) when the defendants have been convicted of conspiring to commit a felony "they shall be punished in the same manner and to the same extent as is provided for the punishment of that felony." Thus, if the laboratory analysis "fee" is a "punishment" then defendants convicted of conspiracy to

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[49] *People v. Wallace*, *supra,* 120 Cal.App.4th at pages 877-878.

[50] Health and Safety Code section 11370.4, subdivision (a).

commit one of the felonies specified in Health and Safety Code section 11372.5, subdivision (a) are liable for that fee.

A cogent argument can be made from the language of Health and Safety Code section 11372.5, subdivision (a) the Legislature intended the $50 laboratory "fee" to be an additional punishment for conviction of one of the enumerated felonies. Subdivision (a) of the statute states in relevant part: "Every person who is convicted of a violation of section 11350 [or] 11352 . . . shall pay a criminal laboratory analysis fee in the amount of fifty dollars ($50) for each separate offense. The court shall *increase the total fine* necessary *to include this increment.*" (Italics added.) The same subdivision also provides: "With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a *fine* in an amount not to exceed fifty dollars ($50), *which shall constitute the increment prescribed by this* section and which shall be in addition to any other *penalty* prescribed by law." (Italics added.)

Support for this interpretation of the statute can also be found in *People v. Talibdeen* in which our Supreme Court held the penalty assessments applicable to "'every fine, penalty, or forfeiture'" applied to the laboratory analysis fee in Health and Safety Code section 11372.5.[51]

Talibdeen is not controlling, however, because the court did not address the question whether the laboratory analysis fee was a punishment. Rather, the court and the parties in *Talibdeen* proceeded under the assumption the fee was a punishment and addressed the question whether the trial court had discretion to waive the penalty assessments.[52]

Furthermore, the label the Legislature places on a charge, whether "fee" or "fine" is not determinative, especially where as here the Legislature used both terms. Courts

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[51] *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153-1154.

[52] *People v. Talibdeen*, *supra*, 27 Cal.4th at page 1153.

have developed multi-part tests for determining whether something is a "punishment"[53] but it would needlessly prolong this opinion to engage in a detailed analysis of every factor. In most cases the determination can be made on the basis of the purpose of the charge imposed. Fines are imposed for retribution and deterrence; fees are imposed to defray administrative costs. It is clear to us the main purpose of Health and Safety Code section 11372.5 is not to exact retribution against drug dealers or to deter drug dealing (given the amount of money involved in drug trafficking a $50 fine would hardly be noticed) but rather to offset the administrative cost of testing the purported drugs the defendant transported or possessed for sale in order to secure his conviction. The legislative description of the charge as a "laboratory *analysis* fee" strongly supports our conclusion as does the fact the charge is a flat amount, it does not slide up or down depending on the seriousness of the crime, and the proceeds from the fee must be deposited into a special "criminalistics laboratories fund" maintained in each county by the county treasurer.[54]

For the reasons set forth above we conclude the trial court erred in imposing a laboratory analysis fee and accompanying penalty assessments on defendants.

DISPOSITION

With respect to defendant Felizardo Vega the sentence on count two (conspiracy to possess cocaine) is reversed and the laboratory analysis fee and related penalty assessments are stricken. The cause is remanded to the trial court with directions to lift the stay on the sentence on count one and to amend the abstract of judgment to reflect the middle term sentence on that count. In all other respects the judgment is affirmed.

With respect to defendant Jose Vega the sentence on count two (conspiracy to possess cocaine) is reversed and the laboratory analysis fee and related penalty

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[53] See discussion in *In re Alva* (2004) 33 Cal.4th 254, 266-269.

[54] Health and Safety Code section 11372.5, subdivision (b).

assessments are stricken. The cause is remanded to the trial court with directions to lift the stay on the sentence on count one. In all other respects the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

JOHNSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.